Shephali

REPORTABLE

IN THE HIGH COURT OF JUDICATURE AT BOMBAY
ORDINARY ORIGINAL CIVIL JURISDICTION IN ITS COMMERCIAL DIVISION COMM ARBITRATION PETITION (L) NO. 74 OF 2020

Rajawadi Arunodaya Co-op Hsg Soc Ltd.,
A society registered under the provisions of the Maharashtra Co-operative Societies Act, 1960 having address at "Arunodaya" Rajawadi, Junction of 4th and 7th Road, Ghatkopar (East), Mumbai 400 077 **…Petitioner**

~ versus ~

Value Projects Pvt Ltd.,
A company registered under the provisions of Companies Act, 1956 through its directors Mr. Mimit Ajit Bhuta, Mrs. Jayashree Ajit Bhuta and Mrs Sonal Mimit Bhuta having address at 501, Bhaveshwar Complex, Next to Vidyavihar Station, Vidyavihar (West), Mumbai 400 086 **…Respondent**

AND

COMM ARBITRATION PETITION (L) NO. 3930 OF 2020

Value Projects Pvt Ltd.,
A company registered under the provisions of Companies Act, 1956 through its directors Mr. Mimit Ajit Bhuta, Mrs. Jayashree Ajit Bhuta and Mrs Sonal Mimit Bhuta having address at 501, Bhaveshwar Complex, Next to Vidyavihar Station, Vidyavihar (West), Mumbai 400 086 **…Petitioner**

~ versus ~

1. **Rajawadi Arunodaya Co-op Hsg Soc Ltd.,**
   A society registered under the provisions of the Maharashtra Co-operative Societies Act, 1960 having address at "Arunodaya" Rajawadi, Junction of 4th and 7th Road, Ghatkopar (East), Mumbai 400 077
2. **Municipal Corporation of Greater Mumbai, incorporated under the provisions of Mumbai Municipal Corporation Act, 1888 having its address at Mahanagar Palika Bhavan, CST, Mumbai 400 001**

   And Also through

   Asstt. Assessor & Collector /

N Ward, Brihanmumbai
Mahanagarpalika Building, 3rd Floor,
Jawahar Road, Ghatkopar (East)
Mumbai 400 086

And also through

The Executive Engineer (Building
Proposal), MCGM, Easter Suburbs,
LBS Marg, Vikhroli (West), Mumbai. …Respondents

APPEARANCES

FOR RAJAWADI ARUNODAYA CHSL	**Mr Mayur Khandeparkar, *with Tushar Gujjar, i/b Solicis Lex*.**
FOR VALUE PROJECTS	**Mr Rohaan Shah, *with Paresh Shah, & Srisabari Rajan, i/b M/s. Shah & Sanghavi.***
FOR MCGM	**Mr Sagar Patil.**
COURT RECEIVER	**Mr DN Kher.**

CORAM : G.S.Patel, J.

DATED : 15th March 2021

ORAL JUDGMENT:

1. This order will dispose of two competing Petitions under Section 9 of the Arbitration and Conciliation Act 1996. The first Petition is filed by the Rajawadi Arunodaya Co-operative Housing

Society Ltd ("Rajawadi"; "the Society") against the Respondent builder, Value Projects Pvt Ltd ("Value Projects"; "the Developer"). The opposing petition is by Value Projects.

2. While the narrative runs the usual pattern with some minor factual variations, I believe it is important to begin with an analysis of the rival claims and the relief that each seeks. Rather than set out the prayers in full, I will summarise them, thus. Rajawadi seeks, first, a mandatory injunction directing Value Projects to deliver possession of the project site or plot along with the structures on it, whether complete or partially complete. It then seeks the appointment of a Receiver to take possession (a prayer added by amendment); a temporary restraint against the Developer from creating third party rights over the land and building; another restraint against the Developer from interfering with or obstructing the redevelopment process being taken up by the Society or from interfering with Rajawadi's possession; and, finally, an order to deliver to the society the necessary documents regarding the redevelopment project.

3. The Developer's Petition first seeks an order of status quo in regard to the Development Agreement as it stood prior to the termination notice of 13th December 2019; a restraint against the Society from appointing another developer; another restraint from creating third party rights; a restraint against the Society from taking steps to eject the Petitioner from the project; and a prayer for a bank guarantee of about Rs.20 crores to secure the Developer's monetary claim.

4. Before I proceed to the factual narrative and the legal questions that arise, I must record here that, although the Society's Petition was filed in January 2020, much of that year was lost to an effective hearing on account of the pandemic. Hearings could not be regularly scheduled to ensure some continuity. Despite this, whenever possible, I took up the matter on several dates in an effort to bring both sides together to avoid precipitating a more protracted legal battle. I did this because there is a partially complete construction on site. The Society and its members have been out of possession and without their new homes for a long time (some members have possession of commercial units). Proceeding on its own or through a new developer is, I thought, very likely a complex and delicate business demanding a next level of civil engineering and construction skill. Plus, there were financial considerations on both sides. If, therefore, both sides could be brought together, the building completed, the Developer's financial obligations under the contract met, and all this done in a stated time-frame under Consent Terms with a built-in default clause, then the needs of all sides could be met and litigation costs, time and trouble saved. To this end, I involved the Municipal Corporation of Greater Mumbai ("MCGM") though not a party to the Society's petition on the aspect of arrears of property tax. I asked Mr Shah for the Developer more than once to submit without prejudice proposals by which the various issues could be resolved. He has done this, identifying the various financial and development matters that need to be addressed. The most recent of these proposals was just a few days ago. None of these proposals has met with the Society's approval. But this is not to suggest that the Society and its members have been unreasonable or that they are unjustified in declining to consider the proposals that come from the

Developer. There is, and now there is no doubt about it, an irreversible and irredeemable loss of confidence in the developer. To put at its most blunt, the Society simply does not trust this Developer one inch. It says through its Counsel, Mr Khandeparkar, that it has ample reasons for this distrust. Some of the considerations that must weigh with a Court of equity are well known, and I will return to these towards the end of this judgment. But, at this stage, it is simply not possible for any Court to compel one or the other side to accept any particular offer. While addressing his case, Mr Shah has fairly stated that his instructions are not to resist the Society's application to be permitted to appoint another developer or to proceed with the redevelopment, but to submit instead that provision be made to safeguard the Developer's rights emanating from the contract. He clarified this to mean that while the development may proceed by the Society through any other developer, and members may take possession of their common areas, amenities and individual apartments or commercial spaces if not already done, the free-sale components should be preserved so that no third party rights are created and are kept available as security for the claim that the Developer undoubtedly intends to make in arbitration. His instructions are to say that the Developer has spent between Rs.19 to 20 crores on the project. But this will not be the fullness of the claim. There will be a claim for loss of profit and possibly for damages. The expenditure by the Developer is not such that can be denied. Therefore, in his submission, some provision must be made to secure at least the return of the Developer's investment in the project. After all, he submits, the Developer started work, and admittedly did a fair amount of it, but none of it was intended to be done gratuitously. Thus, whether one looks at the money claim of the Developer as

arising under the contract or even as a claim for quantum meruit, there can be no doubt that this claim must, in equity, be appropriately safeguarded. If this is not done, he submits, the Developer will be left with a paper award in arbitration and without any effective means of recovery. Section 9 requires an order to be both just and equitable. The requirement of equity, in Mr Shah's formulation, is that the competing rights of both sides must be judiciously balanced so that one side is not left without any remedy or recourse in future at all.

5. I note this at the forefront because it considerably narrows the controversy to be decided. What needs to be seen is whether the Developer in this case or, for that matter, any developer in such a case, can demand security for what is essentially a claim in restitution or damages or both.

6. The facts are actually not many, but they traverse a considerable period of time. I will deal with these as quickly and as briefly as the requirements of such an order allow. The Society's property is on a plot of land at Ghatkopar (East). The plot is just under 1000 sq mtrs. It stands at the junction of 4th and 7th Road at Ghatkopar (East), Mumbai 400 077. On this, there stood the old Rajawadi Arunodaya Cooperative Housing Society's building. This was a mixed-use structure with 20 residential units and seven commercial units. It was very possibly the sort of typical middle-income enclave that one finds everywhere in this city. The shops would have been the routine small and medium vendors, and the residences were unlikely to have been either very spacious or very upmarket. The community was probably an old and well-knit group of friends and neighbours with associations going back many years.

The two-wing building itself was constructed prior to 1985. Over time, it required major repairs. Sometime in 2012, the Society's members got together and decided that these persistent repairs could not be sustained. The existing building required to be redeveloped.

7. Evidently, the Society could not do this re-development itself, because it involved, as all such projects do, the demolition of the existing building, the accommodation of existing occupants in some form of transit or temporary accommodation while re-development was going on, obtaining a large number of permissions with their attendant complexity, completing construction and then putting the Society's members, both residential and commercial, into possession of their redeveloped premises. So the Society invited tenders from respective developers. The matter then followed the usual trajectory. On 20th July 2012, the Society unanimously appointed Value Projects as the developer.

8. This led to a Deed of Redevelopment of 5th April 2013. This was registered a little later that month on 29th April 2013. I will turn to the relevant clauses and provisions of this Agreement for a closer analysis a little later in this judgment. At this stage, it is enough to note that the Developer was to complete the project within 24 months of being delivered vacant possession by the members of the Society and receipt of a commencement certificate. There was a six-month grace period. At its broadest level, the Developer agreed to pay stated amounts as monthly transit or relocation compensation, corpus, reallocation or shifting charges, and some share in the profits. A day later, the Society executed a Power of Attorney in favour of the

Developer. This would have been required to obtain the necessary permissions.

9. An Intimation of Disapproval or IOD — as the initiating building permission in Mumbai is oddly called, with all permissions being worded in the negative — from the MCGM came in on 9th December 2014. Up to this point, the Society members was still in occupation of their respective premises. Very shortly after the IOD, in January 2015, the members of the Society delivered vacant possession to the Developer.

10. This is important because this is the trigger or starting point of the development process. It is also this that triggers a large range of financial obligations on the part of the Developer, including payment of transit rent, etc. This assumes importance for two reasons. *First*, it has not been shown to me that these financial obligations of the Developer were in any way conditional or contingent upon any further act of the Society or its members. In other words, the obligations began to operate once the Developer had possession. *Second*, and this is an aspect to which I will return towards the end of the judgment, is that the delivery of vacant possession of the old flats, and the transition of Society members into transit accommodation, have a profound societal and human impact. This is seldom, if ever, explicitly acknowledged in judgments. But, in my judgment, this must affect any consideration of the balance of convenience, irreparable prejudice and balancing of competing equities.

11. To return to the chronological narrative, on 18th March 2015, there was a letter from the Developer noting the discussions that were held a few days earlier on 11th March 2015. Every member was given the Permanent Alternative Accommodation Agreements (what I will call the P3As) for signature. These were to be returned for registration. It was also apparently agreed that in lieu of the contractually-mandated bank guarantee, the Developer would provide its 500 sq ft office and another 800 sq ft built-up area at Vidhyavihar as security.

12. A partial commencement certificate was received on 28th July 2015.

13. Then there is something of a hiatus for the next two years or so. On 15th April 2017, Value Projects came forward with a confirmation letter proposing a scheduled date of completion, a date for possession of units and other compliances with MCGM rules, dates for payment of corpus and pending transit rent amounts, and in relation to some documents regarding additional FSI. A copy of this document is at Exhibit "E" to the Petition. I do not propose to scrutinize each document in detail — that must await a trial in arbitration — but I look at this only to note item 7 at page 212, for this indicates that even now, the Developer was already in some default of its obligations for payment of transit rent.

14. There was a meeting on 18th July 2017. This follows in relevance from the previous document. Rent had not been paid since December 2016. The second instalment of corpus fund was unpaid.

Rent and other cheques were regularly dishonoured. The Developer said that because of adverse market conditions, there were no investors or buyers and that completion was likely to be inevitably delayed. Despite this, the Developer promised a part occupation certificate at least for the commercial premises by August 2017. The earlier formats of the P3As had to be changed for RERA compliance.

15. About a month later, on 5th August 2017, at a meeting on 5th August 2017, the Developer informed the Society that the timeline for completion would have to be extended even further, now until June 2019.

16. Pausing for a moment, it will be noticed that this is a meeting of August 2017 proposing a completion date of June 2019. The Agreement in question contemplated completion *of the entire project* by April *2015* or, at the most, with a further six-month extension until about October 2015. There was thus already a delay of at least four years in project completion. The Society members themselves had by now been out of possession for a full two years. There were already admitted arrears of transit rent. At the meeting, the members demanded an increase of 10% in the monthly rent with effect from December 2017. The Developer agreed.

17. There was another meeting on 15th September 2017. The Society noted that, despite the earlier promise, the partial occupation certificate for the commercial units promised by August 2017 had not been received. There was now rent pending for over eight months. The Developer asked the Society not to insist on the provision of a

bank guarantee and said that it was obtaining a loan from the Thane Bharat Sahakari Bank ("Thane Bank"). The Society declined to waive the requirement for the bank guarantee. There was another meeting on 8th November 2017. The Developer agreed to provide a cheque of Rs.2 crores as security. It also agreed that if it defaulted in payment of rents by April 2019, the cheque could be deposited. Another meeting followed on 14th January 2018, with minutes dated 11th February 2018. There was again a discussion of pending amounts of transit rent. There was some discussion about the drafts of the P3As. On 26th February 2018, the Developer mortgaged nine residential flats to raise loan funding of Rs.4 crores from the Thane Bank.

18. In June 2018, the Developer substituted its contractor and appointed another, one Jagruti Enterprises. The arrangement between the Developer and Jagruti was one of 'barter'. The Developer allotted Jagruti two flats and also promised certain remuneration. The contractor was apparently at liberty to sell these flats to recoup its costs.

19. On 3rd August 2018, the Developer sent the Society rent cheques for one month. The amount outstanding since December 2016 (nearly two years) was yet not paid. According to the Society, there was even now no work at the site. On 24th September 2018, the Society finally sent a legal notice to the Developer demanding that it clear all outstanding rent and corpus payments, demanding interest on these amounts, demanding that the P3As be executed and registered and that there be a confirmation in respect of other obligations. I find no reply to this notice.

20. By 16th March 2019, there was now in place a new development regime in the form of DCPR 2034. This is a point in time six years down the road from the execution of the Development Agreement. The Developer now proposed that new applications be submitted in accordance with the new development regime (with the Society's approval) so as to obtain a revalidated IOD. Necessarily, the completion timeline would be pushed back even further now from June 2019 to March 2020. The Developer promised payments of arrears of rent by 15th April 2019.

21. This met with the almost predictable response of outrage from the Society. It said that the project had been delayed now for six years. The draft P3As was not in place. There was no clarity on the additional areas to be offered to members. Timelines for completion were not finalized. Approvals on drawings and designs had not been disclosed. Funding arrangements were still unclear.

22. By now apprehensive of the Developer's bona fides and abilities, the Society conducted a search and found that on 28th October 2015, the Developer mortgaged some flats with one SN Damani Holdings Private Limited ("Damani"). The Society also found that some flats earmarked for existing members, i.e. flat Nos. 502, 503, 901 and 902, had been sold to third parties under Agreements for Sale. Several crores of rupees have been borrowed from the Thane Bank by mortgaging 12 residential flats and three commercial units.

23. Matters went from bad to worse. A cheque for Rs. 2 crores dated 30th April 2019 was dishonoured because of stop payment instructions. A replacement cheque dated 7th October 2019, when deposited, was almost predictably dishonoured for insufficiency of funds.

24. On 15th September 2019, the Society resolved to terminate the Development Agreement and the Power of Attorney. Up to this time, there was only a shell constructed to the 7th floor, although the construction was of 13 upper floors.

25. At about this time, there came a demand from the MCGM for Rs.9,35,579/- as arrears of property tax.

26. In October 2019, two members of the Society lodged police complaints against the Developer's partners for illegally creating third party rights in respect of those members' flats.

27. The Society held an extraordinary general meeting on 8th December 2019 and resolved to terminate the Deed of Redevelopment. This was followed a few days later by a formal notice of termination dated 13th December 2019. The notice lists a number of breaches, including a failure to complete construction, a failure to deliver copies of building plans, a failure to pass on the benefits of the implementation of the new development regime, the failure to execute P3As, the failure to pay the monthly rent, the failure to pay hardship compensation, non-payment of taxes and dues, selling members flats to third parties etc. A day later, the Society issued a

public notice. In early January 2020, the Society resumed possession of the suit property. It affixed a notice board at the site and appointed security guards. There is some controversy about the Developer allegedly attempting to break open locks and manhandling the Society's guards and staff, but I will let that pass at the moment.

28. On 13th January 2020, the Developer's Advocates wrote to the Society, asking it to refrain from acting on its termination notice. Now the Developer filed its own cross-petition on 26th September 2020. The Developer has invoked arbitration under the very same Redevelopment Agreement of 5th April 2013. The Society has not done so, but it is now settled law that the Petition itself, and especially one that has followed a route such as this one, may be treated as a notice of invocation of arbitration. This only stands to reason, for what else but arbitration is the Society pursuing? In any case, Mr Khandeparkar states that the Society will formally invoke arbitration within 48 hours from today.

29. Mr Khandeparkar for the Petitioners lists nearly a dozen breaches that he claims the Developer has committed. In no particular order of priority, these are:

(a) Selling four flats supposedly reserved for members to third parties without the members' consent.

(b) Mortgaging premises without earmarking or allotting four premises to existing members of the Society. There is no absolute ban in the agreement from creating a mortgage, but Clauses 5.2.4 and 14(a) say that the Developer is not to make a mortgage, charge or lien until

flats are allotted to members. Mr Khandeparkar says that the mortgages in favour of Damani were without the Society's consent. These mortgages were apparently created to clear old or historical dues. The mortgage in favour of the Thane Bank was of free-sale flats, but at least one member's flat (No. 804) was apparently mortgaged to Damani.

(c) **There was a default in payment of rent. As of the date of termination, the amount is 1,62,88,391/-. This is only the amount payable to residential members. In addition, there is the rent payable to commercial shop members from March 2017 to August 2017, Rs.60,69,400/-.**

(d) **The second instalment of corpus or hardship compensation is even now unpaid.**

(e) **The Developer has not paid his share of property taxes and other statutory dues.**

(f) **The Developer has not provided a bank guarantee of Rs. 3.48 crores.**

(g) **The Developer converted a fourth-floor podium parking area in to residential. There may be some controversy about this because I have understood Mr Khandeparkar to say that this was a proposal by the Developer. Mr Shah clarifies that there is no such proposal and even if it was once made, it is withdrawn. I will, therefore, ignore this aspect of the matter for the time being.**

(h) **Then there are additional breaches alleged in regard to the P3As and the delay in completion.**

30. Until 2018, after which there has been no work on the site, the project status is this. The proposal contemplated a new structure of one basement, a commercial ground floor and first floor, a three-level parking (part parking and partly for a gymnasium on the third level parking), and nine upper habitable floors. As last done, the basement, commercial ground and first floors, three levels of parking and the shell only of just three upper habitable floors had been completed. The total number of residential flats proposed was 35, of which 20 were reserved for members and 15 were free sale flats. All flats in the free-sale component had been sold. This was in addition to the mortgages of members' flats and mortgages in favour of the Thane Bank and Damani. Of the shops, there were thirteen proposed in the redeveloped building. Of these, eleven were to be handed over to members, and two were to be sold in the free sale. One has been sold and is used as a dental clinic, and one is mortgaged to Damani. The status of the proposals has not much changed since July 2015.

31. According to Mr Khandeparkar, there is long list of admitted breaches, including non-payment of rent, arrears of property tax, non-execution of the P3As and delay in construction. This is how the parties are respectively positioned today.

32. The Developer does not necessarily accept this delineation of the breaches as portrayed by Mr Khandeparkar. But that is a matter of detail perhaps best left to arbitration. I am not required in this Section 9 proceeding to examine to each of those of rival contentions in detail. What I am required to do is assess which of the two petitions discloses a sufficient prima facie case for the grant of equitable and discretionary relief. Second, I must assess whether the defence in

each can be said to be tenable, in which case some equities will need to be adjusted, or whether the defence is wholly unstatable in which case no equities will arise in favour of the respondent in each case. Conveniently, the Developer's defence to the Society's petition is the Developer's affirmative case in the other petition, and vice versa.

33. Our starting point for this discussion must be the Development Agreement itself. This will tell us what the reciprocal rights and obligations of the two sides are. It will also facilitate a clearer understanding of the submissions Mr Shah makes before me, one that is entirely predicated on a certain reading of the Development Agreement.

34. A copy of this Agreement is from page 40 of the society's petition. Every member of the Society has joined and is shown as a consenting member. There is a recital at the very beginning which asserts that the Society has a good and marketable title to the plot of land that I have described above. The building, and its separation between residential and commercial units, is mentioned in recital 'B'. The proposal for redevelopment is narrated in recital 'C'. There then follow the operative portions of the Agreement. Mr Shah invites attention inter alia to the first recital and to clause 2.1 and its sub-clauses (a) to (g) to assert that the entire project was predicated on the Society having good title to the entire land. In 2013, when the development was proposed, this would have allowed for an FSI of 2.7. He says that it was found that at least part of the land required Collector's permission and was therefore not freehold but leasehold. This hindered funding from being obtained in a timely fashion. According to Mr Shah, this had a cascading or domino effect.

Without the necessary FSI entitlement in hand at the time of execution of the Agreement, the Developer's entire funding arrangement was thrown into disarray. All that the Developer had was a fraction of the FSI represented to be available on the basis of full ownership. The Developer was unable to raise the necessary funding. This, he contends, was a fundamental breach, or a breach of fundamental term, by the Society. If the Society represented that it had plenary dispositive rights as an owner of the property and it was then found that it did not, thus limiting, reducing or constricting the Developer's planning and benefits, then equity demands that the Developer cannot be held to its obligations irrespective of this factor while the Society is allowed the fullness of its rights. Of course, the project has been delayed. Of course, there have been difficulties in making payment of transit rent and other obligations. But none of this would have happened had the promised FSI been in place, and had there not been this false or misleading representation by the Society, to begin with. The rectification of that title lacuna did not actually happen until December 2018. So it is utterly pointless for the Society to allege defaults on the part of the Developer from April 2013 to December 2018. On the contrary, he submits, despite the very significant impediment and hurdle of an imperfection in title, the Developer did everything possible to keep the project afloat. It is not as if the Developer did not obtain the building permissions. It did. It is not as if the Developer did not put up any construction at all; even on the Society's showing, it did. Only a few floors remained to be done, and the interiors and finishing work. In the current Development Control Regime of DCPR 2034 there may be additional benefits. There is no reason at all, he submits, for the Society therefore to be allowed to terminate the Agreement without having

regard to these factors; and, in particular, the question of title. On the question of equitable rights in continuing with the project, the submission from Mr Shah is not that the Developer necessarily has interest in the land, but he most emphatically has an interest in the project. There is a real, though subtle, distinction between the two.

35. Mr Shah's construct, therefore, rests on two principle foundations. First, there is the submission that the inaccurate representation as to title itself provides an almost complete answer to the question of delay in project completion. The second is that, demonstrably, the Developer has spent between Rs. 19 and 20 crores on the project. Of course, the Developer has done so with a profit motive, i.e. to recoup returns on his investment from the sale at market prices of the free sale units. But that is not only not illegal, let alone a crime; it is his contractual entitlement to begin with.

36. The two arguments must be addressed somewhat differently. The first, as to imperfection of title, is perhaps a more complex question and will require some level of examination when parties lead evidence. Two things militate against its immediate acceptance at this stage. Mr Shah has relied on one set of representations and statements in the Agreement itself. But equally, there is the statement and assertion by the Developer in Clause 2.1(i) at page 58:

> **"2.1 (i) That the title of the said property in the hands of the Owners/Society is clear and marketable and free from all encumbrances and reasonable doubts of any nature whatsoever. Prior to entering into this Deed of Re-development, the Developers have caused the search of the title of the property in the hands of the Owners/Society and have accepted the same. The**

> **Developers shall not be entitled to raise any query as to the title of the said property in the hands of the Owners/Society. However, in the event of any claim being made by any third party in respect of the said property or any part thereof, the same shall be defended by the Owners/Society at its own costs, charges and expenses."**
>
> **(*Emphasis added*)**

37. The other dimension to this first argument by Mr Shah is to see whether, in the correspondence prior to this petition, the Developer has ever said, or contended in response to the legal notices, that it is this lacuna in title that has caused the delay. Mr Shah points to a Resolution of 30th November 2014 in this regard at page 623, which suggests that there were some CTS numbers in the Property Card that reflected as a B1 tenure, and there is also a question of road setback, thus limiting FSI. This is a less than persuasive argument for two reasons. First, these facts are ones that the Developer knew or must be deemed to have known in April 2013. The clause that I have just reproduced contains the Developer's representations that it has taken full search and satisfied itself as to title. A Developer is not some wide-eyed innocent child wandering about in a development wonderland. In a fiercely competitive field, with an eye firmly to vast profits, the Developer is undoubtedly astute about its business. And its business is development. And fundamental to property development is knowledgeability and skill in handling title issues. How could the Developer not have known about the tenure? Was there active concealment? Fraud? There is no such case.

38. The second is a consequence in contract law. If, as Mr Shah says, this was a breach of a fundamental term or was a fundamental breach, then we must ask if the Developer's conduct shows that it saw it as such. Did the Developer terminate the Agreement and sue for damages or restitution or both? Did it allege misrepresentation or fraud and attempt to void the Agreement on that basis? If the Developer is seeking specific performance, as I imagine that it will in arbitration, then it must stand to reason that the Developer has not repudiated this contract. On the contrary, it has condoned this alleged breach and proceeded on the footing that the Agreement is subsisting, valid and binding, and capable of being specifically performed. In other words, its own previous conduct does not show that it has treated this as a breach by the Society.

39. Can the financial obligations of the Developer be fairly said to be linked to any corresponding obligation of the Society or a correctness or otherwise a particular representation? It is only if Mr Shah can show such a linkage that his argument will have any heft. One of the representations by the Developer is to be found in Clause 2.3(a) at page 60. This tells us that, for its part, the Developer warranted that it had not only sufficient experience and expertise but also the finance to carry out the development of the project. Putting these two together, what we see is that on its search of the title and its assessment of the FSI entitlement as it then stood, the Developer warranted that it had the sufficient experience, knowledge of title, expertise and finance to fulfil the obligations it undertook. The obligation to enter into an agreement with the members in Clause 2.3(b) is not contingent on any other factor. Clause 5 deals with the obligations of the Developer. These include the obligation to

demolish, to purchase and acquire TDR, to obtain the necessary sanctions, get layouts of plans approved, pay all costs and so on. The Developer was bound to furnish the Society with certified copies of the sanctioned plans. Clause 5.1.3 says that the Developer shall be solely bound and liable to pay all municipal taxes, water, power bills use of the Collector from the date of commencement of demolition of the existing building until expiry of 30 days' after the Developer has offered possession of the new premises. Then there is an obligation in Clause 5.1.5 to complete the construction within 24 months. The financial obligations in the Agreement include payment of temporary transit rent or compensation in Clause 6(iv)(a) for residential premises and Clause 6(v)(a) for commercial premises. The obligation to pay hardship compensation is in Clause 6(iii). Not one of these obligations is conditional or contingent upon either FSI or any representations or warranties.

40. While Mr Shah invokes the indemnity provision of the Agreement in Clause 21, this only means that if there is a claim against the Developer by any third party or someone claiming by, through or under the Society, the Developer is entitled to be damnified. But if the Developer seeks to enforce an indemnity, the Developer must sue on that indemnity. There is no such third party claim, and the damnification does not extend to what Mr Shah describes as a failure to make out a good title, or a fundamental breach. That is not a reason to deny interim discretionary relief here.

41. The more troubling aspect of the matter is that Mr Shah's construct really amounts to a re-writing of fundamental and essential terms of the Agreement. This is despite Clause 24 which says that no

addition, alteration or amendment is to be valid, operative, effective or binding unless in writing and signed by the parties hereto. There is no such agreement.

42. If, therefore, it is to be held that the default by the Developer in meeting its financial obligations is not a fundamental breach because of the alleged misrepresentation as to title, then that really amounts to inserting an entirely new conditionality into the Agreement. In my understanding of it, arbitration law is a constricted branch of the wider law of contracts. It provides a method by which contractual disputes are to be resolved. It does not actually create a contract. Contractual rights are governed by the law of contracts. The Arbitration Act controls the manner in which those contractual disputes are to be resolved. For this reason, an arbitrator — being necessarily a creature of contract, one who would not exist as an arbitrator but for a contractual agreement to that effect – cannot ever re-write the terms of a contract. For an identical reason, neither can an arbitration Court.

43. This sort of argument, and one that comes so late in the day, can hardly be said to be one that will work in favour of the Developer.

44. As I see it, the Developer may be entitled to mount a claim for damages or specific performance or restitution or any combination of these. But that does not by itself means that it should be allowed to continue to throttle the Society's attempt to complete its development.

45. On the question of an interest in the project, I drew Mr Shah's attention to the Supreme Court decision in *Sushil Kumar Agarwal v Meenakshi Sadhu*,[1] gave him time to consider it and invited him to make his submissions on it. I heard him and Mr Khandeparkar on this decision and submissions in regard thereto on 18th March 2021.

46. Mr Shah's submission was that the *Sushil Kumar Agarwal* judgment makes a distinction between different types of agreements in relation to development. Of course, this judgment was rendered in the context of a claim for specific performance challenging the termination of an agreement and seeking an injunction against the owner from engaging a third party. In paragraph 17, the Supreme Court considered the expression 'Development Agreement'. It said that this is a catch-all nomenclature that may apply to a range of agreements that a property owner may enter into for the development of immovable property. Paragraph 17.3 speaks of an agreement by a property owner (or a person with other rights in immovable property) with another person who is granted development rights. Typically, the developer is required to deliver a part of the constructed area to the owner, and, as consideration, is entitled to deal with the balance constructed area. Sometimes, a society or other association is formed and the land is conveyed or leased to such society or association. In some categories of development agreements, thus, a developer may acquire a valuable right either in the property or constructed area. A right in the project is thus distinguishable from a right in the land. A developer may not have an interest in the land but may nonetheless have a valuable right in the project. In paragraph 19, the Supreme

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1 (2019) 2 SCC 241.

Court spoke of a developer possibly acquiring such a valuable right sought in the property or constructed area. This is a divesting by the owner of part of the owner's complex of *in rem* rights. Where the developer has incurred a substantial investment, altered the state of the property or created third party rights in the property, a different set of considerations might well arise. In such a case, it might be difficult to hold that an agreement is "per se incapable of being performed". Where a developer is able to show that for no fault on its part, the property owner is seeking to resile from the agreement and terminate it, it may be difficult to hold that the developer is not entitled to enforce his rights. It is this portion on which Mr Shah places great reliance. One of the assessments required, he submits, is the extent of harm or injury allegedly suffered by the developer, and whether or not compensation is sufficient recompense for the losses suffered if the contractual breach on the part of the owner is established.

47. But the question, as Mr Shah points out, is what is to happen when there is, as it were, a midstream upending of a contractual possession as originally contemplated. He submits that rights that have accrued and third party rights that have been created must necessarily be protected. A termination of such agreement is not to be easily allowed. In this context, and in response to one of my queries, he pointed out that there is no standalone or distinct termination clause in this agreement. Clause 9.1 at page 108 speaks of a specific set of circumstances, i.e. if demolition of the existing building is not commenced within six weeks after issuance of IOD and of members having delivered possession. In that case, the Society and its consenting members could terminate the Deed of

Redevelopment. Nobody has invoked this clause. The only other clause is 13(i) at page 118. This says that if the Developer fails to obtain approvals and start construction from the date of the agreement, the agreement and the Power of Attorney would automatically end, the Society could enter into an agreement with a third party without any claims from this Developer, and the Developer would not be entitled to claim a refund of any amount that is paid to the Society.

48. I do not believe Mr Shah is completely correct in saying that this excludes the possibility of termination on account of any other breach by the Developer. Even if neither of these clauses is invoked, the general law in contracts and especially Section 39 will apply.[2] It is surely unreasonable to suggest that a developer may commit a breach of a term of the contract, even a fundamental term, but the Society is shackled.

49. In all this, we should not miss something that seems to me to be cardinal. It is a mistake, in my view, to pillory a developer for being profit-oriented. That is the nature of every developer's business. That is what it does. Pursuing a profit is, as Mr Shah points out, neither illegal nor criminal. It is perfectly legitimate. The question is not whether the pursuit of a profit is a good or a bad thing. It is a question of fidelity to the contract that permits the pursuit of profit. It is only this aspect of the matter with which we are concerned. In

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2 **Section 39. Effect of refusal of party to perform promise wholly.—When a party to a contract has refused to perform, or disabled himself from performing, his promise in its entirety, the promisee may put an end to the contract, unless he has signified, by words or conduct, his acquiescence in its continuance.**

the course of pursuing that profit, the developer will create third party rights. Those cannot, in turn, create equities in favour of the developer against its contractual counterparty, the society. The developer takes the risk of satisfying those third-party claims simply because those third-party rights are principal-to-principal agreements between the developer and third parties. The developer created them and incurred liabilities to third parties on his own and in pursuit of his gains. But that is only ever legitimate if the developer is not in default of its obligations to the society in the first place. No developer can be heard to say it has rights vis-à-vis third parties or free sale areas while yet in default of its obligations to the society. The fulfilment of the obligations to the society by the development is the sine-qua-non that entitles the developer to create third party rights and make profits from the free-sale areas. Absent a fulfilment of a foundational obligation to the society, there are no equities or rights that inhere in a developer vis-à-vis others or in respect of any free-sale areas.

50. The other fundamental factor never to be lost sight of is this: the Society is the owner of the property. It belongs to the Society. The Society and the members will decide how and through whom they want to exploit their legal ownership rights over that property. It is not for any other outsider to say in generality that the rights of an owner have been compromised. If the Society has divested itself of ownership rights, there are ways in law of doing this. If the Society has found that its redevelopment project has not proceeded in the manner that it intended, then the Society is always within its legal entitlement to undertake the development itself or through any other developer of its choice. To resist this, a developer must able to show unequivocally that it is the society that is in default and it must show

this in the clearest and most unambiguous terms, not in some roundabout, inferential or speculative manner. I imagine Mr Shah understands this perfectly well. This is indeed the reason he has been at pains to try and make out a case in regard to deficiency of title. But if that case is not a clear and unambiguous breach, i.e. a fundamental breach, then his submissions will not assist his client, the Developer here.

51. There is a considerable amount of judicial learning on this branch of the law. I myself have had occasion to deal with such issues in the past, but before I turn to those, I believe this is an opportune matter to set out some broad principles.

52. There are, in my experience, and I do not say this with any rigidity, three broad classes of disputes of this kind pertaining to societies and their disputes with developers.

(a) In *Category 1*, we find those cases where an agreement is entered into, the society and its members for some reason or the other do not vacate although the developer has everything ready to proceed.

(b) In *Category 2*, one that is sadly quite common, we have a situation where the society and their members vacate, the developer takes possession, but then nothing happens for years together; and when the society tries to take charge of its own estate and redevelopment, the developer comes forward and cites the pendency of the agreement. In such cases, the developer is very often in default of huge amounts of financial obligations. There,

clearly, there is no equity on the side of the developer. Such developers are often only speculating in land and property prices.

(c) ***Category 3*** **cases, and this is where I believe the present case falls, are those where the society has vacated, the developer has taken possession, has done some amount of work, but then at some point falls behind in payment of financial obligations and completion of development. This is a downward spiral. The developer gets mired more and more in debt. The arrears of transit rent keep mounting with each passing month, and then there is a near financial impossibility. Sometimes, these matters are resolved by negotiations, but it is here that the questions of law and of assessment of contracts really arise.**

(d) ***Category 4*** **cases are of the kind where both the society and the developer are on the same page. Most members of the society have vacated. The developer is ready to proceed, but there are one or two dissenting members. This category of cases will fall within the *Girish Mulchand Mehta & Ors v Mahesh S Mehta & Ors*[3] line of judgments and need not detain us. That is now a separate jurisprudence of its own.**

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3 2019 SCC OnLine Bom 1986; *Aditya Developers v Nirmal Anand Coop Hsg Soc Ltd & Ors*, 2016 SCC OnLine Bom 100: 2016 (3) Mah LJ 761; and *Sarthak Developers v Bank of India Amrut-Tara Staff CHSL*, Appeal (L) No 310 of 2012.

53. Each of one these requires a slightly different approach, but in the Category 3 cases with which we are concerned, I would venture to suggest that, again without attempting to lay down any strait jacket or rigid formula, the following tests are among those to be applied:

(a) Can it be shown that there is a default on the part of the society in fulfilling its obligations? For instance, has the society failed or refused to vacate? Has it wrongly claimed arrears of transit rent or other dues although these have been paid? Is the society itself merely trying to squeeze more financial gain out of the developer? If so, the society's petition will be dismissed — possibly with costs and even strictures — and the developer will receive the full weight of protection against unjust or unlawful termination.

(b) Can the default by the society be said to be a fundamental breach or a breach of a fundamental term such as would excuse the developer from performing one or more of its obligations? For instance, a failure to deliver possession might constitute such a fundamental breach; for, without possession, the developer simply cannot proceed. Unless it has vacant possession, the developer has no obligation to pay transit compensation or, possibly, the other dues.

(c) Can it be shown that the financial or other obligations of the developer have a one-to-one correspondence with the obligations of the society such that a default by the society would absolve the developer from the performance of his obligations? Again, an example of

> **this might be the society's obligation to deliver vacant possession. It is quite clear from any reading of any of these agreements that a failure to do so will result in the developer being excused from performing almost all his obligations including the financial obligations. But once this has happened — and this is why at the beginning of this judgment I called a trigger event — then a series of consequences begin to follow. Unless it is demonstrated that the developer's ensuing obligations have a express conditionality attached to them, the developer cannot seek to evade the consequences of a breach of its financial obligations and its obligations to complete the development on time.**

54. Therefore, a final factor relates to how a Category 3 case developer conducts itself once the society has come to court. There are several distinct elements in play at this time: (i) accumulated arrears of transit rent and other dues; (ii) the obligation to pay ongoing transit rent until possession with an occupation certificate; (iii) payment of statutory and corporation dues, including property tax (including arrears, and irrespective of when these are actually due), for non-payment puts at risk the very property of the society; and (iv) a demonstration of the financial means to bring the project to completion. To stave off a society's petition framed such as the present one is, the respondent-developer must place an acceptable proposal that covers all these. Accumulated arrears can be capitalized and allowed to be paid in reasonable tranches or instalments. But while that is happening, ongoing payment obligations must be met month to month. All statutory dues and property taxes must be

cleared. There must be a tenable, viable and cogent statement of availability of financing to complete the project, and this, in turn, requires a fair estimate of the remaining costs of completion, disclosure of the source of funding (not some woolly promise or expectation) and the actual and ready availability of, and access to, that funding. Inevitably, there will also be a default clause in any such re-worked understanding that culminates in Consent Terms or a consent order: if there is a default (of such kind as is agreed before the Court), the developer must accept (a) the termination; (b) ejectment from the site; and (c) its liability to pay all accumulated financial debts until the date of default — all resulting automatically in an enforceable order of the court. Nothing short of this will do.[4]

55. In the narrative that I have set out above, I find no explanation or no justification for Value Projects to have created third party rights in respect of flats allotted to members. It is simply not possible to accept the argument that this was necessary because the alleged misrepresentation as to title had financial consequences, and therefore, the developer was left with no choice. This is a clear-cut breach of the terms of the Development Agreement. It simply cannot be explained in this manner. Similarly, there is no explanation for the non-payment of the second instalment of the corpus or the defaults in payment of the rent.

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4 In some cases, the court has taken the extraordinary step of having the Court Receiver complete the project. See *Goverdhangiri CHSL v Bharat Infrastructure & Engineering Ltd*, cited below.

56. I have previously had occasion to hold in *Borivali Anamika Niwas CHSL vs Aditya Developers & Ors*[5] that non-payment of rent is a breach of a fundamental term. The same consideration will apply here.

57. I have also dealt with the issue of how such equities should be balanced in *Goverdhangiri CHSL v Bharat Infrastructure & Engineering Ltd*:[6]

> **13. Before me today Mr. Tamboly for the 2nd Respondent has candidly accepted that there are arrears of transit rent that remain unpaid. He does say that the 2nd Respondent has put a considerable amount into the project. He cannot however claim that the project is complete except for minor finishing works; there is clearly much that remains to be done. There are pending instalments of FSI that have not been paid. Sale proceeds from the free sale flats have not been put into the escrow account. There are significant arrears of property tax. A bank guarantee of about Rs. 3 crores to cover the rent to be paid has not been furnished. The arrears of compensation until March 2020 have touched nearly Rs. 3 crores.**
>
> **14. I have given both sides repeated opportunities to try and resolve these differences. I am mindful of the condition of the members of the society. This has to be a primary concern of any Court of equity. Indeed this was the primary concern that led to the Court in the contempt petition taking an extraordinary step of appointing not**

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5 2019 SCC OnLine Bom 10718.

6 2020 SCC OnLine Bom 2787. This was also the view taken in *Chaurangi Builders and Developers Pvt Ltd v Maharashtra Airport Development Company Ltd*, 2013 SCC Online Bom 1530.

only a Receiver but a Special Committee including an independent Architect to complete the project. The society's members had to be provided housing at the earliest possible. They also had to be provided transit accommodation.

15. Let us take a step back and imagine or visualize the scenario from the point of view of the members of the society represented by Mr. Subramanian. He has not, in fairness, used this simply as a point of prejudice though he was well within his rights to have done so. His submissions have been to portray the desperate plight of the members of the society: out of the original homes that they had for a long time, left to fend for themselves for payment of compensation or rent while in transit; deprived of rent and displacement compensation; not being provided their homes; only being given repeated assurances; and with no real prospect of seeing their new promised homes ever becoming reality.

16. Consequently, Mr. Tamboly's task as an advisor to the 2nd Respondent necessarily meant that the 2nd Respondent would, to avoid the consequences that must now follow, have to commit unequivocally to even more stringent conditions. One of these would be to establish that it is not in arrears and to clear all financial dues to the society. It is true that the society has indeed invoked a bank guarantee but there has been no restraint against that and that is well within the permissible contours of the law regarding the bank guarantee. That is not an equitable consideration that can conceivably be invoked by the 2nd Respondent. There is undoubtedly an amount payable to the society. This has not been paid. Construction has not been completed. Property tax dues are in arrears — and this alone puts the Society's own property in jeopardy for no fault of the Society's members. There is no evidence

before me that the 2nd Respondent has any funds at all to complete the project. It only says that it is on the verge of receiving financial support. That is not good enough.

17. The only argument available to the 2nd Respondent is that it has ploughed money into the project. This is commended as an equitable consideration. It is not. It can never be. The 2nd Respondent committed to the re-development enterprise not out of any altruistic motivations for the common good of the Society, but to make a profit. It knowingly took the risk. It risked its funding. Every risk-taking necessarily contemplates either success or failure, two sides of a single coin. No developer can turn an open-eyed risk into an advantage in equity unless it shows that its risk has been caused or increased by a default by the Society, but for which matters would not have come to this pass. The 2nd Respondent developer cannot insist on contractual rights being safeguarded or protected as a matter of equity or law. If the developer wants equity, the developer must demonstrate that it has done equity; clearly at least at a prima facie stage, this appears to be far from correct.

18. As against this — and this is the 'balance of convenience' test — is the condition of the Society and its members, and the inconceivable prejudice to them. Apart from the very many tangibles I have outlined above, there is now the added burden of finding a source of funding, or a means of self-financing, to complete the project, and perhaps having to write off the promises displacement compensation altogether short of an arbitral award in a long and expensive litigation process. There can be not the slightest doubt that the balance of convenience is with the Petitioners who have made out a very strong prima facie case.

> **19. The prejudice to the Petitioners if relief is denied will be incalculable. All that they are being offered today are more promises. Promises were made before, only to be broken, again and again and again.**
>
> **(*Emphasis added*)**

58. ***In Punjab National Bank Workers' Cooperative Housing Society Ltd vs Meeti Developers,***[7] **while holding against the developer I said:**

> **17. The question therefore now is whether it can truly be said that the developers is entitled to any equitable discretionary relief under Section 9. That can only be done if in a matter like this the developers is able to demonstrate prima facie that any delay is not attributable to it and that it has, in other words, fulfilled and complied with its contractual obligations.**
>
> **18. … … …**
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> **19. … … …**
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> **20. The other argument for equitable relief that Mr Davar advances is that the developers has paid compensation — the amount is not relevant — though it was 'not bound to do so', and the Society members have accepted it till as late as 2020. Payment of transit rent or displacement compensation is a contractual provision. It is nobody's case that the developers was not bound to pay any transit rent or displacement compensation at all. What the submission really amounts to is that by conduct of parties the Addendum of 13th December 2017 was somehow novated and a modified Agreement was arrived at. This**

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7 Arbitration Petition (L) No 8189 of 2020 and connected matters, decided on 11th February 2021. Here, too, there were cross petitions by the society and the developer, almost exactly paralleling the present case.

is not even remotely facie compelling. If there is to be any alteration of the Agreement, clearly it would have to be in writing and this is true whether or not the Agreement contains any specific provision to that effect. I say this because the Addendum had the signatures of all the society members and the shopkeepers as well. I do not see how it can be said that generalised statement of payment to one or the other or in differential amounts could lead to a novated Agreement with the different terms including an expansion of the time frames applicable to all. The old residential structure still stands. It is empty and vacant. The shopkeepers' structure still stands but they are in occupation. Nothing whatsoever has happened.

21. This is sadly the stark reality of redevelopment project in this city. Society members are entitled to better their living conditions. The property is theirs. They are the owners of it. It may be that in the course of redevelopment they are required to confer certain rights on a developer. After all, they are not able to afford the costs of reconstruction themselves. Allowing a developer the right to sell free sale units is compensation for the developers putting up the rehabilitation units to re-accommodate members. This does not confer by itself in every case rights in the land in favour of a developer. There are equitable considerations to be kept in mind. A developer is in search of only thing: the profits that it will make from the project. The interest of society members are entirely different. What they are looking at is better homes, ones long promised to them, but ones that remained an unfulfilled dream forever receding in time.

22. The contest is therefore between what is a essentially human displacement problem and the purely profit-oriented objective. If there is to be an equitable balance, then there can be no doubt on which side a Court

of equity will lean. The developers may have a claim to be made in damages. It is free to pursue that claim. That cannot give it rights in specie over the property itself nor can it subject the full ownership rights of the society to its demands. Not only is the developer entirely profit-oriented, and that necessarily matters that a developer can be compensated in money terms, immediately putting them out of the reach of any interim relief, but they have also cannot said to have acquired any direct interest in the land itself. Indeed, the only situation in which a developer may be able to get some relief is if it can demonstrate that it has played it 'by the book', as it were, and there is no default on its part.

23. An attempt, however, on the other hand to choke up a development to leverage changes in development policy and available FSI to maximise profit is a strategy that comes at a real cost to society members, and is a stratagem that no Court of equity can, will or should ever countenance for a minute.

24. The strategy is plain and, like the Emperor's clothes, it bares all. The idea is to keep the society and its members hanging by a thread, stuck in an endless cycle of delayed payments and part payments, all the while ostensibly keeping the contract 'alive', claiming rights in it, and waiting to squeeze every last drop of available buildability out of the project only to maximize profits.

25. If therefore today Meeti Developers is unable to demonstrate compliance, the fact it may have made some payment in between will be of no avail. The only way it can stave of its ejectment as a developer is to demonstrate complete and exact compliance with its contractual obligations under the contract. This it is clearly unable to do.

26. The society for its part does not have to do very much more then demonstrate the lack of compliance by the developers. The society is after all the owner of the property and its title is paramount. The society terminated the Agreement on 12th November 2020. I cannot understand why the developers even then sat idly by and did not think to come to Court till as late as 18th January 2021. That delay alone probably tells us all that we need to know about the bona fides of the counter petition by Meeti Developers.

(*Emphasis added*)

59. Meeti Developers was taken in appeal. A few observations of the Appeal Court while dismissing the Appeal are relevant. In paragraphs 11, 13 and 14 the Appeal Court held:

"11. Even if we were to ignore the fact that there has been a tremendous (and largely unjustifiable) length of time that has passed since the original Development Agreement and consider events only after the Addendum of 13th December 2017, in our view, prima facie, there appears to be a complete failure on the part of the Developer in complying with the timelines set out in the Addendum. Admittedly, the NOC from MHADA which was agreed to be obtained by the Developer within 90 days from the execution of the Addendum, was obtained almost 2. 5 years after the execution of the Addendum i.e. only on 15th June 2020. Even thereafter, the IOD which was agreed to be obtained within 90 days of the MHADA NOC, was not obtained by the Developer; the same was eventually obtained through the Society's new Architect on 19th January 2021. There is no cogent justification or explanation given for the delay between 2017 and 2020.

13. It is trite that a party must be held to the terms of its bargain. Having failed to fulfill its part of the bargain, the Developer cannot now seek to restrain the Society from enforcing the provisions of the Addendum which entitle it to terminate the Agreements and proceed with the redevelopment through a different builder.

14. *Even otherwise, on the factual matrix before us, we cannot allow the developer continuing to hold the project to ransom despite having miserably failed to comply with the timelines which were solemnly agreed to by the Developer*. It is also important to note that the Society terminated the Development Agreement on 12th November 2020 and for over 2 months, the Developer made no attempt to approach the Court or seek a stay of the termination. In the meantime, the Society has taken steps to appoint a new developer and has obtained the IOD through its new architect. This delay also militates against grant of any interim relief to the Developer pending the arbitration.

(*Emphasis added*)

60. The Meeti Developers Appeal Court also referred to the decisions in *Jal Ratan Deep Cooperative Housing Society Ltd vs Kumar Builders Mumbai Realty Private Limited*[8] and *Gopi Gorwani vs Ideal CHSL.*[9]

61. I am leaving aside any argument about the pandemic and Covid. The defaults of this Developer go back much further than that.

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8 Arbitration Petition (L) No. 219 of 2015, decided on 24th June 2015.

9 Notice of Motion 1393 of 2012 in Suit No. 762 of 2012, decided on 10th June 2013.

62. The legal position that I have mentioned above is also the view taken by this Court in *SSD Estatics Pvt Ltd vs Goregaon Pearl Co-op Housing Society Ltd;*[10] *The New Aarti Co-operative Housing Society Ltd vs Kabra Estate & Investment Consultants;*[11] and *Solaris Developers Pvt Ltd vs Eversmile Co-operative Housing Society Ltd.*[12]

63. I need not at this stage trouble with any further issues regarding the rights of third flat purchasers whether or not those are protected or nor are outside the frame of present discussion.[13]

64. Having said this, there are certain overriding factors that I believe I must heed. Section 9 is a discretionary and equitable remedy, and the consideration of equity is often determinative. After all, in such cases, we are not dealing with any arms' length market transaction of simply putting up a building on an empty plot of land. On the one side is the question of development, the Developer, his commercial intentions, genuine as these are. On the other, is a very real issue of human displacement and of an associated trauma caused to an entire community by the delay in project completion. The description of this Society, with which I began this judgment, might as easily apply to almost any community in this city, whether Maharashtrian, Gujarati, Tamil, Kannada, Parsi or otherwise. We are all familiar with these communities. They are part of our lives and

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10 Commercial Arbitration Petition (L) No. 1072 of 2018.

11 2015 SCC Online Bom 5929.

12 Arbitration Petition (L) No. 593 of 2019.

13 *Goregaon Pearl CHSL Dr Seema Mahadev Paryekar & Ors*, 2019 SCC Online Bom 3274; *Vaidehi Akash Housing Pvt Ltd vs New DN Nagar Co-operative Housing Society Ltd & Ors*, MANU/MH/2888/2014.

always have been. This city is really nothing but an agglomeration of these communities working together. The aridity of contractual documents, lawyers' notices and legal argot often mask or occlude the enormous tragedy that lies beneath. This particular Society, with its 20 houses and seven shops, was, in all likelihood, once a community of its own. I am speculating, but I imagine that in such a compact society, not only did everybody know everybody, but everybody knew everything about everybody. Families would have shared joys and sorrows, been together in good times and bad, celebrated festivals together. Entire floors, even wings, might have had a more or less open-door practice, with people constantly in and out of each other's houses without needing the formality of invitations to visit. When, therefore, in the context of a dryly-worded contract, we speak of "development", it does not tell us what actually has happened — that this community has been literally splintered and torn apart. Persons who were together perhaps for generations are now dispersed across the city. They may have lost their immediate and daily contact. The contact that has persisted through generations has almost certainly been lost. When and how that will ever be brought back is a major question mark. This is what has been lost in translation. This is what delayed redevelopment projects do not begin to let us understand. There is a very real human tragedy unfolding in case after case, and it is tearing apart the social fabric of this city. It is all very easy to say in a Court of law that "arrears of transit rent" have not been paid. What does this actually mean? Digits and commas on a page in a lawsuit do not let us comprehend the terrifying reality of what that non-payment of rent month after month after month must mean to ordinary middle-income people. For one thing, it means they have to find their own way to pay the rent in transit. No landlord is

going to wait for a developer to pay up. That, in turn, would have meant risking being dis-housed and put on the street with families, old parents, young children. It might well have meant giving up any number of things, some too frightening to contemplate — even food for the family. These are not matters to which, just because we are in the rarefied preserves of a court of law, we should blind ourselves. These are the stark and terrible realities underlying such contracts.

65. I mention this (and some of this may indeed be speculation) because when one speaks of the 'balance of convenience', another umbrella term, one must attempt to give it some life and colour and actual societal context. This speaks of the comparative mischief or hardship to be weighed when granting or refusing relief. But there is nothing here but *im*balance. The defaults by the Developer have undoubtedly caused immense prejudice and harm to the members of the Society. The hardship to the members is real and immediate; the so-called hardship to the Developers is notional. When it spent in the project, this was no altruism or charity. It was an investment toward great profit. Every investment involves risk. The Developer gambled on the project. Receiving monthly rent is not a sop, not a matter of 'convenience'. *It is a matter of survival*. Therefore, the non-payment of dues, the delays in project completion, and not paying transit rent for months together speaks to an inherent, and constantly growing, social injustice. It should not be allowed to continue. Therefore, apart from the exceptionally strong prima facie case that the Society makes out, the 'balance of convenience' is decidedly in its favour.

66. These development agreements are, above all, in the nature of an *entrustment*. They are not entered into blindly. There is a long and

laborious process of society notices, general body meetings, the appointment of a consultant as an advisor, calling for tenders, scrutinizing the bids, ensuring compliance with laws and regulations, looking at the proposals and so on to the end of the chapter. This is as it must be. For what is it that is actually happening here? The society is entrusting an outsider with the one single asset that justifies the society's existence, that actually defines the society: the society's property. This is not the entrustment of some *other* land on which to build so that the society can make handsome profits; no, this is the entrustment of the actual property being used by the society and its members, the very homes in which they live. The society's members agree to this upheaval, to move out altogether, to separate from each other while their new homes are built. The promise to them is that they will be looked after and provided for while their new homes are being built. Days, weeks, months and years pass; the members do not receive the promised rent. Thus begins the downward slide. The promised homes are delayed, then delayed further, and then delayed even further. This cuts at the root of the initial entrustment. A development project for a society demands commitment, fidelity, respect and honesty. When these begin to disappear, the contractual relationship collapses. Where there was anticipation and confidence, there is now just bitterness, disappointment and despair. There is a breakdown of confidence, and there is only distrust. Loss of faith and confidence on account of contractual violations and breaches by a developer are sufficient grounds to find for the society and against the developer.[14] Indeed, I would go a step further. There is urgency for the society. Therefore, the slightest delay in project completion,

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14 ***Gopi Gorwani v Ideal Cooperative Housing Society Ltd & Ors*, 2013 SCC OnLine Bom 1967.**

unless specifically accepted by the society, and even one single default in payment of transit rent or other dues is actually sufficient to warrant a termination. There is no such thing in these matters as 'substantial compliance'. That is not the principle of obligations in the realm of private law.

67. If we, therefore, approach these two matters from this perspective, I do not believe it is even remotely possible to suggest that this Developer, persistently in default, persistently delaying, and never able to come up with actual money to make good the vast accumulated arrears of financial obligations should now be able to tell the society, "You will not be able to eject us from this project. When we will complete your homes, we cannot and will not say. When we will pay your dues, we cannot say. How we will raise finances is unclear. We have none with us now. When you will finally get what you are contractually due, we also cannot say. Even so, we are entitled to be here until we make our profits."

68. What is it that the society says on the other hand? In whatever manner the prayers are worded all that the Society says is, "Give back to us that which was ours. Allow us to get back our homes, and restore our lives."

69. That is an application that, in these circumstances, is impossible to resist.

70. Mr Khandeparkar is mindful, as am I, that the first prayer is for a mandatory injunction. This brings us within the frame of the law as

declared by the Supreme Court in *Samir Narain Bhojwani v Aurora Properties & Investments & Anr*[15]and *Dorab Cawasji Warden v Coomi Sorab Warden.*[16] This has recently been explained in *Hammad Ahmed v Abdul Majeed & Ors,*[17] to say that an ad-interim mandatory injunction is not to be granted lightly or for the asking; but it is also not forbidden. An exceptionally strong prima facie case has to be made out. If satisfied that withholding such an injunction would be unjust and unconscionable, resulting in a perpetuation of injustice, then a court of equity will indeed grant it. This, I believe, is a case that wholly warrants such an injunction.

71. As amended, the prayers in the society's Petition read thus:

> **"(a) An order of mandatory injunction directing the Respondent, its directors, servants, agents and/or persons claiming through them hand over peaceful possession of the property viz. Land being part of CTS Nos. 4836, 4837, 4838, 4839, 4840, 4841, 4842, 4843, 4844 and 4844A admeasuring 997.20 sq. mtrs along with the existing structure/s (completed or otherwise) standing thereupon titled as Redevelopment project of "Rajawadi Arunodaya" situated at Junction of 4th and 7th Road, Ghatkopar (East), Mumbai – 400 077;**
>
> **(a-1) That this Hon'ble Court be pleased to appoint a Court Receiver, High Court Bombay and/or any other fit and proper person to act as a Receiver having all powers under Order XL r.1 of the Civil Procedure Code to take possession of the said property i.e. CTS Nos. 4836, 4837, 4840, 4841, 4842, 4843, 4844 and 4844A admesuring 997.20**

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15 **(2018) 17 SCC 203.**

16 **(1990) 2 SCC 117.**

17 **2019 SCC OnLine SC 467, paragraphs 57 and 58.**

sq. mtrs. equivalent to 1192.65 sq. yards and buildings standing hereon known as Rajawadi Arunodaya CHSL, lying and being at "Arunodaya" Rajawadi, Junction of 4th and 7th Road, Ghatkopar (East), Mumbai – 400 077, and said project i.e. "Value Platinum" (with police assistances, if required) and hand over the said project and property to the Petitioner herein;

(a-2) That this Hon'ble Court be pleased to restrain the Respondent its Directors, officers, servants, agents, and/or all or any persons claiming through and under them b y an order of temporary injunction from creating third party rights i.e. mortgages, sale lien, leave and license, lease, gift and/or encumbrance of any kind whatsoever in respect of the said property i.e. CTS Nos. 4836, 4837, 4840, 4841, 4842, 4843, 4844 and 4844A admesuring 997.20 sq. mtrs. equivalent to 1192.65 sq. yards and buildings standing thereon known as Rajawadi Arunodaya CHSL, lying and being at "Arunodaya" Rajawadi, Junction of 4th and 7th Road, Ghatkoper (East), Mumbai – 400 077, and said project i.e. "Value Platinum" in any manner whatsoever;

(b) That this Hon'ble Court be pleased to restrain the Respondent its Directors, servants, agents, contractors and/or all or any person claiming through or under them by way of a temporary injunction from intermeddling, interfering, obstructing in the redevelopment process, construction by the Petitioner by appointment of a third party developer, contractor, completion by self-development process and/or all or any other acts done on the said property and the said project by the Petitioner and/or its assignees, nominees, agents, contractors, developers;

(c) That this Hon'ble Court be pleased to restrain the Respondent its Directors, servants, agents, contractors and/or all or any person claiming through or under them by way of a temporary injunction from interfering in the

possession of the Petitioner Society and/or in manner dispossessing the Petitioner Society and its members and/or its assignees, nominees, agents, contractors, developers etc from the said project and said property;

(d) That this Hon'ble Court be pleased to direct the Respondent its Directors, servants, agents, contractors and/or all or any person claiming through or under them to hand over possession of all the Original Documents (i.e. Development Agreement, Power of Attorney, original approvals, original sanctions, original payment receipts and/or all or any documents in relation to the said property and said project) in the custody and possession of the Respondent and/or all or any other writing executed between the Petitioner and Respondent."

72. I will have to make an order in terms of prayer clauses (a), (a-1), (a-2), (b), (c) and (d) of the Society's petition, reproduced above. Further—

(a) The Court Receiver is appointed only to ensure that there is no disturbance at site.

(b) The Court Receiver will remain in symbolic possession of the site until the completion of the project.

(c) Any interference with the Court Receiver by the Developer will be treated as an act of contempt of Court.

(d) The Receiver will appoint the Society as its agent without payment of royalty. The Society's office bearers will execute the necessary Agency Agreement under an order of the Court.

(e) The Developer-Respondent is to hand over all necessary documents in original within two weeks from today. If

copies of the relevant plans are not given by the Developer, Mr Patil on behalf of the MCGM agrees that his officers will make available copies to the Society or its newly appointed architects on payment of the necessary copying charges.

(f) The MCGM will accept the Society's nomination of a new architect without insisting upon a no-objection certificate from the previous architect/licensed surveyor.

73. The Society's Petition is disposed of in these terms. There cannot be the kind of relief that the developer seeks in its Petition. The developer's Petition is thus dismissed.

74. Mr Shah points out that one of the commercial units, No. 107, has been sold to an outsider who has taken possession and is running a dental clinic there. In this fight between the Society and this Developer, that medical practitioner should not suffer. On this, at least, I believe Mr Shah is completely correct. The Court Receiver is not to disturb the possession of the person in occupation of Unit No. 107. When that person seeks to join the Society as a member, that application will be dealt with on merits in accordance with law. I see no reason to appoint the Court Receiver of Unit No. 107, but if that owner believes it is in his interest to be protected by a receivership, he or she is at liberty to approach the Court Receiver. If the owner exercises the choice, the Court Receiver will so stand appointed of Unit No 107, to take symbolic possession and to appoint the owner without royalty as his agent until re-development is complete and an

occupation certificate is obtained. This direction is purely for the protection of the owner of Unit No. 107 so that none can obstruct his or her possession or question title. But the choice is with the owner.

75. There is yet another commercial Unit No. 108. Mr Shah says this is not only Developer's site office but also its commercial office. He would have it that the Developer should be entitled to continue using this site office. Finally, Mr Shah submits that the Developer should be given a reasonable time to clear its material from site.

76. The question regarding Unit No. 108 is very problematic. That unit is mortgaged to the Damani NBFC. It was actually allotted to a member under a letter of allotment against payment. There is some dispute about whether the payment was received or not, but that again will not help Mr Shah at this stage. There is no occupation certificate for any part of the structure. How, in these circumstances, the developer can itself claim a right to continue to occupy these premises is unclear. I cannot accept that claim.

77. I will give the Developer time until 19th April 2021 to remove itself, its equipment and material from the entire site. It also has that much time to vacate Unit No. 108. It is to deliver possession of Unit No. 108 to the Court Receiver, who will deliver possession to the office bearers of the society.

78. This order is not a final determination of the Developer's final contentions or claims. It may in arbitration seek suitable reliefs other than those in its present Section 9 Petition, which is dismissed.

79. The views and findings on facts in this order are prima facie and for the purposes only of this order.

80. At this stage, both sides request that I appoint an Arbitrator. I nominate Mr Karl Shroff, learned Advocate of this Court, to decide the disputes and differences between the parties under the Agreement of 5th April 2013.

TERMS OF APPOINTMENT

(a) **Appointment of Arbitrator: Mr Karl Shroff, learned Advocate, is hereby nominated to act as a Sole Arbitrator to decide the disputes and differences between the parties under Agreement of 5th April 2013.**

(b) **Communication to Arbitrator of this order:**

(i) **A copy of this order will be communicated to the learned Sole Arbitrator by the Advocates for the Petitioner within one week from the date this order is uploaded.**

(ii) **The Advocates for the Petitioner will forward an ordinary copy of this order to the learned Sole Arbitrator at the following postal and email addresses:**

Arbitrator	**Mr Karl Shroff, Advocate.**
Address	**Frenville, Jussawala Wadi Juhu, Mumbai 400 049**
Mobile	**98200 69915**
Email	**karlshroff@hotmail.com**

(c) **Disclosure: The learned Sole Arbitrator is requested to forward, in hard copy or soft copy (or both), the necessary statement of disclosure under Section 11(8) read with Section 12(1) of the Arbitration Act to Advocates for the parties as soon as possible. The Advocates for the Petitioners will arrange to file the original statement in the Registry. If the statement is**

forwarded in soft copy, a print out of the covering email is also to be filed in the registry.

(d) Appearance before the Arbitrator: Parties will appear before the learned Sole Arbitrator on such date and at such place as the learned Sole Arbitrator nominates to obtain appropriate directions in regard to fixing a schedule for completing pleadings, etc.

(e) Contact/communication information of the parties: Contact and communication particulars are to be provided by both sides to the learned Sole Arbitrator. The information is to include functional email addresses and mobile numbers.

(f) Section 16 application: The respondent is at liberty to raise all questions of jurisdiction within the meaning of section 16 of the Arbitration Act. All contentions are left open.

(g) Interim Application/s:

(i) Liberty to the parties to make an interim application or interim applications including (but not limited to) interim applications under Section 17 of the Arbitration & Conciliation Act, 1996 before the learned Sole Arbitrator. Any such application will be decided in such manner and within such time as the learned Sole Arbitrator deems fit.

(ii) The learned Sole Arbitrator is requested to dispose of all interim applications at the earliest.

(h) Fees: The arbitral tribunal's fees shall be governed by the Bombay High Court (Fee Payable to Arbitrators) Rules, 2018.

(i) Sharing of costs and fees: Parties agree that all arbitral costs and the fees of the arbitrator will be borne by the two sides in equal shares in the first instance.

(j) Consent to an extension if thought necessary. Parties immediately consent to a further extension of up to six months to complete the arbitration should the learned Sole Arbitrator find it necessary.

(k) Venue and seat of arbitration: Parties agree that the venue and seat of the arbitration will be in Mumbai.

(l) Procedure: These directions are not in derogation of the powers of the learned Sole Arbitrator to decide and frame all matters of procedure in arbitration.

81. Rather than make an order of costs in these Section 9 Petitions, I will leave it open to both sides to seek the costs of these Petitions as costs in arbitration.

82. The Petitions are disposed of in these terms.

(G.S. PATEL, J.)